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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

The United States, Libelant-Apellant, against The Paquete Habana, Justa Galban *et al.*, Claimants-Appellees.	No. 578.
The United States, Libelant-Apellant, against The Lola, Severo Gonzales, Claimant-Appellees.	No. 579.

BRIEF FOR APPELLEES.

STATEMENT.

These are appeals from final decrees of the District Court, for the Southern District of Florida, entered in pursuance of the mandate of this court issued under the decision on the previous appeals. *The Paquete Habana, The Lola*, 175 U. S., 677.

On motion of the Solicitor-General the court has ordered that all the fishing smack cases be advanced for argument on March 16, 1903, and that *The Paquete Habana* and *The Lola* be heard as one case.

It was determined on the previous appeal that the vessels and their fish were not lawful prize of war, and that the captures had been made without probable cause. 175 U. S., at p. 714. The mandate directed the District Court, in each case, "to enter a decree that the *proceeds of the sale of the vessel, together with the proceeds of the sale of her cargo, be restored to the claimant with damages and costs,*" but that "*the damages to be allowed shall be compensatory only* and not punitive." *Paquete Habana Rec.*, p. 20; *Lola Rec.*, p. 15.

In pursuance of these directions the proceeds of the sales of the vessels were duly paid over to the claimants on April 5, 1900. *Paquete Habana Rec.*, p. 23; *Lola Rec.*, p. 17.

Interlocutory decrees were entered in accordance with the terms of the mandates, and, by request of the parties, the assessment of the compensatory damages to be recovered by the claimants was referred to Eugene O. Locke, Esq., United States Commissioner, who is also the clerk of the court. *Paquete Habana Rec.*, p. 21; *Lola Rec.*, p. 16.

Testimony in behalf of the claimants of both vessels was taken in Havana under a commission issued to Hon. Joseph A. Springer, Commissioner, in August, 1900.

The witnesses thus examined in the *Paquete Habana* case were Jose Pasos, a part owner of the vessel (p. 27). Juan Lluria, a shipwright and shipbuilder, and, at the time of his examination, Harbor Master of the Port of Havana (p. 29), who testified to the value of the vessel; and Francis Gandon (p. 30) and Antonio Suarez (p. 31), who testified to the value of the fish.

In the *Lola* case the witnesses examined were Severo Gonzales, owner of the vessel (p. 22), Juan Lluria, shipwright, shipbuilder, and Harbor Master of the Port of Havana (p. 22), who gave evidence of the value of the vessel; and Francis Gonzales and Antonio Suarez, who testified to the value of the fish. *Rec.*, p. 25.

Cross-interrogatories were duly administered to all these witnesses by the United States Attorney, and by the Proctors for the Naval Captors.

At the final hearing before the Commissioner, on August 6, 1901, the United States examined as a witness John F. Horr, the United States Marshal for the Southern District of Florida, who testified in relation to all the smacks. *Paquete Habana Rec.*, p. 32.

The United States Attorney reserved leave to put in further evidence after the hearing. *Paquete Habana Rec.*, p. 55; *Lola Rec.*, p. 51.

On October 7, 1901, the United States Attorney took the depositions of seven witnesses in Key West. These depositions are entitled in all the cases, and are printed at length in the Paquete Habana record, at pp. 40-52. The witnesses thus examined were Samuel Cates, whose

occupation was the sponge business (*Paquete Habana Rec.*, p. 40); William D. Cash, a merchant (p. 43); Milton Curry, a merchant (p. 46); Alfred Atchison, a seaman (p. 48); William Reedy, a liquor dealer (p. 50); and William B. Curry, an auctioneer (p. 52).

It should be noted, however, that all the witnesses did not testify about all the vessels. None of them expressed any opinion as to the value of the *Paquete Habana*. Cates testified with reference to the *Espana* and the *Oriente* (*Paquete Habana Rec.*, pp. 40, 41); Cash, with reference to the *Poder De Dios* and *Antonio y Paco* (pp. 43, 44); Milton Curry, with reference to the *Severito* and the *Lola* (p. 45); Lowe, with reference to the *Cuatro de Setiembre* and the *Engracia* (pp. 46, 47); Atchison, with reference to the *Santiago Apostal* and the *Oriente* (pp. 48, 49); Reedy, with reference to the *Antonio Suarez;* William Curry, with reference to the *Poder De Dios* and the *Antonio y Paco* (pp. 52, 53).

On the testimony thus produced the commissioner assessed the compensatory damages to be recovered by the owners of the *Paquete Habana* as follows:

Value of the vessel at the time of her capture	$4,500.00
Interest to the date of the report, November 2, 1901	1,287.00
Total	$5,787.00
Less proceeds of sale previously paid to the claimant	121.69
Balance	$5,665.31
Expenses of issuing and executing the commission to Havana	21.75
	$5,688.06

(*Rec.*, p. 58).

The grounds on which the commissioner proceeded, in ascertaining the damages, are set forth in his opinion relating to all the cases, which is printed in full in the Paquete Habana record at pages 55-58.

There were no exceptions to the report by the proctors for the captors.

The United States Attorney excepted to the report on the following grounds:

1. The amount allowed as compensatory damages is excessive and not sustained by the evidence.

2. The value of the vessel as ascertained by the commissioner is contrary to the evidence.

3. The commissioner erred in disregarding the testimony of the witness John F. Horr for the United States.

4. The commissioner erred in not hearing and sustaining the objections to the interrogatories propounded to the witnesses examined under the commission at Havana.

5. The commissioner, by his report, appears to have disregarded the testimony of the several witnesses for the United States examined in Key West.

6. The commissioner erred in limiting his consideration of the value of the vessel to the testimony as to the cost and alleged market values in Havana, Cuba, only. *Rec.*, pp. 59, 60.

The exceptions were fully argued, and were considered by the District Judge (p. 60). The report was in all things confirmed, with an allowance of $25 to the commissioner for his services on the reference. *Rec.*, p. 63. An order of confirmation was entered on May 19, 1902 (p. 63). It was also ordered, at the same time, that the owners be substituted in place of the master as claimants (p. 63).

It had been agreed, by a stipulation between the proctors for the respective parties, that the "damages and costs shall be charged against the United States or the naval captors, or apportioned between the United States and the naval captors as to justice may appertain, and as the legal responsibility therefor may appear; and that either party

shall have the right to review the decree entered pursuant to said mandate on the question of the amount of damages, and the United States, the naval captors, or the claimant, shall have the right to review such decree on the question whether the ultimate legal responsibility for such costs and damages rests upon the United States or upon the naval captors." P. 22.

The interlocutory decree which was entered on the mandate, and in pursuance of this stipulation, was approved as to form by the Attorney-General, and by the counsel for the captors. P. 22. It provided, among other things:

"2. That the libel herein be and the same hereby is dismissed, and that the proceeds of the sale of the above-named vessel, together with the proceeds of any sale of her cargo, be restored to the claimant, with compensatory damages and with costs; the question whether such damages and costs shall be charged against the United States or the naval captors, or apportioned between the United States and the naval captors, being reserved for further consideration on the coming in of the commissioner's report as to the amount of such damages." *Record,* p. 21.

In pursuance of this provision of the interlocutory decree, notice was given, on June 6, 1902, to the Attorney-General, the United States Attorney for the Southern District of Florida, and the proctors for the naval captors, that a further hearing would be had on June 16th, "on the question whether the damages to be awarded to the claimants herein shall be charged against the United States or against the naval captors, or apportioned be-

tween the United States and the naval captors, as provided in the interlocutory decree entered herein on or about April 5, 1900, and that at the time and place stated a proposed final decree in the foregoing form will be presented for settlement and entry by the counsel for the claimants." *Paquete Habana Rec.*, p. 65.

At the time appointed, the District Judge, "after hearing the attorney for the United States and the attorney for the naval captors," determined that the damages were to be paid by the United States, and entered a decree that the claimants have, receive and recover from the United States the amount of the commissioner's report, with additional interest from the date thereof to the date of the decree, together with the amount of the commissioner's charge on the reference, making in all the sum of $5,992.52. *Paquete Habana Rec.*, pp. 64, 65.

Similar proceedings were had in the case of the *Lola*. The stipulation between counsel for the respective parties, and the interlocutory decree are in the same form. *Lola Rec.*, pp. 16, 17. The same proceedings were had on the reference before the commissioner as in the other case.

The damages to be recovered by the owners of the *Lola* were determined, by the commissioner, as follows:

Value of the vessel	$5,000.00
100 quintals of fresh fish	500.00
	$5,500.00
Interest to date of report, November 2, 1901	1,547.32
Total	$7,047.32
Less proceeds of sale previously paid to claimant	425.16
Balance	$6,622.16
Expenses of issuing and executing the commission to Havana	21.75
Total	$6,643.91

(*Rec.*, p. 50).

The exceptions to this report by the United States Attorney were identical in form with those previously quoted in the case of the Paquete Habana. *Rec.*, p. 54. The exceptions were overruled, and the report was duly confirmed with an allowance to the commissioner for his services on the reference. *Rec.*, p. 58. An order of confirmation was entered May 19, 1902 (p. 60). It was also ordered, at the same time, that the owners be substituted in place of the master as claimants (p. 60).

On June 6, 1902, notice of hearing on the question of responsibility for the damages, as between the United States and the naval captors, was given for June 16th (*Rec.*, pp. 58, 59); and on that date, "after hearing the

attorney for the United States and the attorneys for the naval captors, and on motion of the proctors for the claimants, a final decree was entered for the amount found to be due by the commissioner with the addition of the commissioner's charges on reference, and interest to date of the decree, making in all the sum of $6,966.55.

Thereupon, and on June 24, 1902, the United States appealed from the final decree in each case, and filed an assignment of errors, which is entitled in all the cases, as follows:

FIRST.—The court erred in sustaining the report of the commissioner as to the amount of damages sustained by the claimant.

SECOND.—The court erred in overruling the exceptions filed by the complaint to the report of the commissioner.

THIRD.—The damages awarded to the claimant are excessive and exorbitant.

FOURTH.—The court erred in overruling the motion of the complainant to have the damages awarded against the captors.

FIFTH.—The court erred in awarding damages herein against the United States. *Paquete Habana Rec.*, p. 66; *Lola Rec.*, p. 60.

Only two questions are presented for consideration by the Brief for the Government: 1, as to the measure and quantum of damages; and, 2, the responsibility for the damages as between the Government and the captors.

FIRST POINT.

NO SUFFICIENT GROUND FOR THE REVERSAL OF THE DECREE IS SHOWN, SO FAR AS THE QUANTUM OF THE DAMAGES IS CONCERNED.

1. There is no serious dispute as to the principle on which the damages are to be assessed. The claimants are entitled to "fair indemnity for the losses sustained by the seizure." *The Nuestra Senora De Regla,* 17 Wall., 29, 31. The owners of the vessels being Cubans, and the vessels having been seized in Cuban waters when about to enter Cuban ports, the damages are naturally to be measured with reference to the value of the vessels and property in Cuba rather than in the United States. *Bates* v. *Clark,* 95 U. S., 204, 210. The damages to be awarded should be equivalent to the injury sustained. *The Lively,* 1 Gallison, 315; *Hetzel* v. *Baltimore & Ohio Ry.,* 169 U. S., 26. This principle is impliedly recognized in the mandates issued under the previous decision, which provided that the damages should be "compensatory." *Paquete Habana Rec. 1,* pp. 19, 20; *Lola Rec.,* pp. 14, 15.

On filing the mandate in the District Court, the interlocutory decrees, which were consented to as to form, by all the parties, contained this provision:

"That it be referred by request of the parties to Eugene O. Locke, Esq., United States Commissioner, to

ascertain and report to the Court, with all convenient speed, the amount of the compensatory damages to be recovered by the claimant herein, in conformity with this decree, and with the opinion and decrees of the Supreme Court herein." *Paquete Habana Rec.*, pp. 21, 22; *Lola Rec.*, p. 15.

Mr. Locke was the Clerk of the Court. *Paquete Habana Rec.*, p. 67; *Lola Rec.*, p. 61. The Court sat in Key West during the war, and Commissioner Locke, by virtue of his office, must have had knowledge of the conditions at that place, as well as of the vessels themselves.

The legal principles to be applied in considering the effect of his decision and reports, are well summarized by the Court of Appeals of the Fourth Circuit in *The Elton*, 83 Fed. Rep., 519, 520. Simonton, Circuit Judge, there said:

"The reference to a commissioner was authorized by Rule 44 in Admiralty. The Commissioner, under that rule, had and possessed all the powers in the premises which are usually given to, and exercised by, masters in chancery in references to them. The reference was with the written consent of parties, and was presented to and made by the court as the result of such consent. The same regard must be had for the findings of the commissioner, under these circumstances, as would have been shown to the findings in a report of a master in chancery. The conclusions of a master on matters of fact are, under all circumstances, entitled to great respect. *Medskar* v. *Bonebrake*, 108 U. S., 66, 71, 72; *Tilghman* v. *Proctor*, 121 U. S., 136, 149, 150; *Callaghan* v. *Myers*, 128 U. S., 617, 666, 667. And when, as in this case, both parties present to the court a consent-order providing for a re-

port by the master of his conclusions upon the facts and the law, the court will not disturb his conclusions of fact unless they are clearly in conflict with the weight of the evidence. *Kimberley* v. *Arms*, 121 U. S., 512, 524. The rule is clearly stated by Mr. Justice Brown in *Davis* v. *Schwartz*, 155 U. S., 631, 636: 'As the case was referred by the court to a master to report not the evidence merely, but the facts of the case and his conclusions of law thereon, we think that his finding, so far as it involves questions of fact, is attended by a presumption of correctness similar to that in the case of a finding by a referee, the special verdict of a jury, the findings of a circuit court in a case tried by the court under Rev. Stat., Sec. 649, *or in an admiralty cause appealed to this court.* In neither of these cases is the finding absolutely conclusive, as if there be no testimony to support it; but, so far as it depends upon conflicting testimony, or upon the credibility of witnesses, or so far as there is any testimony consistent with the finding, it must be treated as unassailable.' *Wiscart* v. *D'Auchy*, 3 Dall., 321; *Bond* v. *Brown*, 12 How., 254; *Graham* v. *Bayne*, 18 How., 60, 62; *Norris* v. *Jackson*, 9 Wall., 125; *Insurance Co.* v. *Folsom*, 18 Wall., 237, 249; *The Abbotsford*, 98 U. S., 440." To the same effect are *Crawford* v. *Neill*, 144 U. S., 585, 596; *Furrer* v. *Ferris*, 145 U. S., 131.

The order of reference on consent in this case left the determination of matters of law as well as of fact, with relation to the damages, to the Commissioner, and called for his report as to the amount to be recovered. It appears, therefore, to be within the rule just stated. But, if it should be considered that the order merely called on the Commissioner to report his conclusions on matters of fact, his decision would still be entitled to much weight.

Thus in *Tilghman* v. *Proctor*, 125 U. S., 136, 149, Mr.

Justice Gray, in dealing with the weight to be attached to a master's report on matters of fact, said:

"We are then brought to a consideration of the exceptions taken to the master's report in matters of fact affecting the accuracy of his conclusions in respect to the amount of those profits, gains and savings. In dealing with these exceptions the conclusions of the master, depending upon the weighing of conflicting testimony, have every reasonable presumption in their favor, and are not to be set aside or modified unless there clearly appears to have been error or mistake on his part. *Medskar* v. *Bonebrake*, 108 U. S., 66; *Donnell* v. *Columbian Ins. Co.*, 3 Sumner, 366, 371; *Mason* v. *Crosby*, 3 Woodb. & Min., 258, 269; *Paddock* v. *Commercial Ins. Co.*, 104 Mass., 521, 531; *Richards* v. *Todd*, 127 Mass., 167, 172."

These observations apply *a fortiori*, in this case, because the headquarters of the District Court for the Southern District of Florida were, until quite recently at Key West, and there is every reasonable probability not only that the Clerk of the Court knew the general conditions at that place, which affected the value of boats of this class, but also that he knew the qualifications of all the witnesses who were examined on behalf of the United States at that place.

Judge Locke, who had also resided for many years at Key West, heard argument on the exceptions to the report, and, after consideration, overruled them, and ordered that the report be confirmed (pp. 60, 63).

The case comes before the Court, therefore, with the concurrent finding of the Commissioner and the Court in favor of the claimants on this subject. If the case is

not strictly within the rule under which this Court uniformly declines to interfere, except for manifest error, with the concurrent finding of two lower courts (*The Ship Marcellus*, 1 Black, 414; *The Conqueror*, 166 U. S., 110, 136), it would seem that an analogous principle should be applied.

In *The Conqueror, supra*, at p. 136, Mr. Justice Brown said that whether the charges there discussed "were proper or not, was a matter for the courts below to determine in the exercise of their best judgment; and as the commissioner found that they were, and both the District Court and the Circuit Court of Appeals affirmed his action in that regard, we are not disposed to disturb their finding, although the amount seems large."

2. The evidence produced on the part of the claimants, in the case of the *Paquete Habana*, consisted of the depositions of Jose Pazos, part owner of the vessel (p. 27), Juan Lluria (p. 29), a shipbuilder and shipwright, who was harbor master of the port of Havana, during the period of the American occupation, and at the time of his examination, who testified as to the value of the vessel at the time of the capture; and Francis Gandon and Antonio Suarez (pp. 28, 31), who testified as to the value of fish.

Pazos testified that he and two of his brothers owned jointly a half interest in the vessel, and that Dona Justa Galban owned the other half. The Pazos brothers had paid $2,400 Spanish gold for their half of the vessel, at a

time not precisely stated, but which was between the year 1892, when the vessel was purchased in Havana, and the time of her capture (pp. 27, 28). It is to be inferred that they had bought their interest about two years before the capture. *Ans. to 8th Int.*, p. 28. Repairs had been made to the vessel after they bought their interest in her, and with those repairs "the appraised value the vessel had, at the time of her capture, was $4,500" (p. 27).

Juan Lluria, a man of ripe experience, testified that he was a shipwright, a master ship carpenter and builder, by occupation, and that at the time of his examination, in August, 1900, he was harbor master of the port of Havana. That position, he says:

"Was an official position under the Spanish government, to which I was appointed in 1897, having served as a suplente or deputy for about thirty years. It was my duty by virtue of my position to inspect and examine and value all vessels that entered the harbor of Havana, and especially all vessels that made repairs in this port. I have inspected and valued the fishing smack Paquete Habana to be worth, on the 1st of March, 1898, $4,500 Spanish gold, basing my appraisement of said vessel upon her especial conditions and my constant inspection of vessels of her class, as appears in my certificate of inspection and appraisement of a number of such vessels made at the request of Messrs. Vilar, Senra & Co., Bengochea & Co., and filed with my declaration in the case of Antonio y Paco, and marked Exhibit A, to which I refer, and of which I now produce a copy (translated) of the part thereof referring to the Paquete Habana, to be filed for convenience with this declaration, Exhibit A." P. 29.

The witness adds that he had no official records to keep, but that he made reports to the captain of the port in the

case of each vessel respecting her inspection, *valuation*, expense of repair, &c., and that such reports should be of record in the office of the captain of the port. P. 29. Such records, at the time of the examination of the witness, were in charge of officers of the army or navy of the United States, and must have been accessible to the government. No effort was made to dispute the testimony of the witness by reference to these records.

The certificate Exhibit A to which the witness referred was as follows:

"I, the undersigned, Juan Lluria y Pujadas, harbor master of the port of Havana, an expert appointed by Messrs. Vilar, Cura & Co. and Bengochea & Co. to appraise the value of their respective fishing smacks, *in the condition in which they were in on the 1st day of March of this year*, do hereby certify that, owing to the constant inspection which I make of these vessels in my official capacity, the fishing smack Paquete Habana, registered folio 1,996, of twenty-eight tons burden, wooden hull, schooner rigged, rigged tight and staunch, sail and gearing complete, with necessary iron ballast, capstan, two anchors and chains, galley caboose, and outfit, sailing compass, lanterns and side lights, and other appurtenances, and one boat with equipments all in good condition, I appraise in the sum of $4,500 Spanish gold" (p. 30).

The counsel for the Government suggests that this certificate, which bears date November 23, 1898 (p. 30), was issued for use in these cases, and that accordingly the valuation made by this witness should be accorded very little consideration. It may be observed, however, that the vessels had been condemned and sold at the date of this certificate, and the appeal which was taken to this

Court, had not been heard. The certificate antedated the decision of this Court, awarding restitution, by more than a year, and it was not introduced in evidence until more than two and a half years after it was issued. Moreover, though the certificate is dated November 23, 1898, it appears from the testimony of the witness and from the certificate itself, that the valuation was made on March 1st, 1898, which was prior to the outbreak of war. *Lluria,* pp. 29, 30.

The owner also intimates that the appraisal had been made prior to the capture. *Pazos,* p. 27.

Lluria states further that he made his reports in regard to his inspection *and valuation* of the vessel to the Captain of the Port (p. 29); and as the vessel had been condemned and sold at the time he granted the certificate to her owner on November 23, 1898, the fair inference from the testimony would seem to be that the appraisal itself had been made and reported to the Captain of the Port on or before March 1st, 1898, and that the certificate, which is in evidence, was subsequently granted by him, on the basis of the previous appraisal, and very probably for use on some form of petition to the Executive Department of this Government for compensation for the capture.

Gandon and Suarez testified that after the blockade was established the price of fresh fish gradually rose until at the time of the capture they were worth $10 silver per quintal (p. 31), equivalent in United States currency to about $5 per quintal (p. 56). A quintal is a weight of

100 pounds. This made the price 5 cents a pound. The vessel had on board at the time of her capture forty quintals of fish (p. 10). But, by inadvertance, the Commissioner made no allowance therefor (*Report,* p. 58). The value of these fish was $200.

The testimony of Pazos and Lluria satisfies the rule laid down in *The Ironmaster,* Swabey, 443, that the best evidence of the value of a vessel is the "opinion of competent persons who knew her shortly previous to her loss." It is a class of evidence commonly resorted to in collision cases. There can be no question of the competency of the witness Lluria, and his disinterestedness and good faith may safely be assumed from the fact that, at the time of his examination, he was an officer of the United States government, and that his deposition was taken before Mr. Joseph A. Springer, who, it is believed, was vice-consul at Havana at the outbreak of the war, and was sent again by this Government to that place after the war was ended.

The average earnings of the vessel also indicate that the valuation given by the claimants is not excessive. She earned about $75 a month, or $900 a year. *Pasos,* p. 27. This is the equivalent of 20% on the capital of $4,500 which was invested. The earnings stated are net. P. 27. The fact that part of the catch went to the crew for their services in place of wages (p. 28) does not affect the significance of these earnings as an indication of the value of the capital invested.

No effort of any kind was made to contradict or vary the testimony produced by the claimants in

Havana, until the date of the final hearing before the Commissioner at Jacksonville, a year later. Even then no evidence of any sort from Havana was offered by the libelant.

The marshal of the district, John F. Horr, was examined on the final hearing before the Commissioner. Mr. Horr was the only witness examined by the government as to the value of the Paquete Habana. P. 31. None of the witnesses examined in Key West referred to her value in any way. The Commissioner correctly held that Mr. Horr was not a qualified witness as to the value of the vessel, and that his testimony was not entitled to any substantial weight. P. 56. This witness stated that he had been interested in six or more small sailing vessels (p. 33), but did not profess to be qualified to speak of the value of smacks. He was asked:

"Q. Captain, have you kept yourself posted during your residence in Key West of the value of vessels of the character of the Quatro de Septembre? A. I wouldn't like to say that I have. She is a fishing smack, and *a class of vessel I haven't had anything to do with.*" P. 33.

With reference to the Paquete Habana he was asked:

"Q. The Paquete Habana, she is valued at $4,500 by the claimants in this case. From your present recollection of her appearance and condition, state whether or not this is excessive; and if so, what in your opinion would be a fair valuation?

> "Same objection. [The objection referred to, which is set out on page 34, was: Objected to as immaterial and irrelevant as applied to American vessels' value, and also because sufficient foundation has not been laid for the question.]

"A. The Paquete was a small sloop smack. I don't recollect about her age. I knew about her age at that time, but I don't recall now. She sold for $490. Considering her age and size, I would think $1,500 would be a fair valuation for her." P. 35.

It is submitted that the objection to this question was well founded, and that the action of the Commissioner in ultimately sustaining it (*Report*, p. 56) was proper.

On cross-examination Mr. Horr testified:

"Q. Captain, all of the values that you have given with reference to the different vessels have been values at Key West? A. Yes, sir.

Q. You don't propose, as I understand it, to speak of values in Havana? A. No, sir, I don't know anything about them other than what I have known them to pay for vessels coming over to Key West." P. 38.

He also admitted that his judgment had been guided, to some extent, by certain offers that had been made to him to build vessels in Key West, but admitted that these offers had not related to the building of fishing vessels or smacks. P. 38. Fishing vessels, he admits, cost more to build. P. 38. Moreover, his estimate of the cost of building was based on his supposition that Mr. Lowe, a witness for the Government, had built the smack Emma Lowe in Key West for $5,000. P. 37. The boat in question was of 49 tons, and had actually cost $10,000 (*Lowe*, p. 47), or about $200 a ton, instead of $90 or $100 a ton as Mr. Horr (p. 37) had supposed.

It also appeared from Mr. Horr's examination that there was no employment, and no demand, for this class of boat in Key West:

"Q. The employment of boats in this class from Key West would no longer be profitable, would it? A. No, sir; not with the laws that they had at that time.

Q. When did the change in laws to which you now refer take place? A. I think it must have been in 1897 or 1898.

Q. And about that time were [*sic*, did] all boats of that class that were then under the American flag go out of business? A. I think they did.

Q. What was the change of law? A. Well, I always supposed it was on account of an import duty put on fish over in Cuba.

Q. These changes of law you speak of were in Cuba? A. Yes, sir.

Q. When the American fishing boats of that class were engaged in the fishing business what was their principal market? A. Havana.

Q. And it was some discriminating restrictions that were imposed there that drove them out of the business? A. Yes, sir; either port duties or duties on fish.

Q. Now, Captain, it is a pretty difficult matter, is it not, to form much of an opinion of the value of a boat built some years ago, when you do not know how well she has been kept up and rebuilt and repaired? A. Yes, sir. A man who is not familiar with the boat's construction, it is pretty hard to get at her value.

Q. Some old boats when rebuilt are practically as good, are they not? A. I think so; yes, sir.

Q. Now, prior to the time that my learned friend here requested you to come in and express your opinion of these boats, have you turned these questions over in your mind since you sold them three years ago? A. No, sir.

Q. And the opinions that you have expressed were those that occurred to you at the moment of your examination, without any previous examination? A. Yes, sir." *Horr*, pp. 38, 39.

In this state of the proofs in relation to the value of the vessel and the damages suffered by the claimants in

consequence of her improper condemnation and sale at the instance of the United States, it cannot fairly be said that any error was committed which would justify the Court in reversing the decree.

If it can be considered, in any view, that the testimony of Mr. Horr was that of a qualified witness, still there are two witnesses against him, one of whom is quite as disinterested, and the Commissioner and the Court have decided against the evidence of the Government witness. In that posture of the matter the rule stated by Mr. Chief Justice Waite in *The Richmond*, 103 U. S., 540, 543, may fairly be applied:

"Two courts have already, on the same testimony, decided against The Sabine and the insurers of her cargo. As long ago as 1861 we said, speaking through Mr. Justice Grier, in the case of *The Ship Marcellus*, 1 Black, 417, 'We have had occasion to remark more than once that when both courts below have concurred in the decision of questions of fact * * * parties ought not to expect this court to reverse such a decree by raising a doubt founded on the number or credibility of witnesses. The appellant in such a case has all presumptions against him, and the burden is cast on him to prove affirmatively some mistake made by the judge below in the law or in the evidence. It will not do to show that on one theory supported by some witnesses a different decree might have been rendered, provided there be sufficient evidence to be found on the record to establish the one that was rendered.' This rule, thus stated from the preceding case was uniformly followed afterwards until the Act of February 16, 1875, * * * relieved us from the labor of weighing evidence. * * * It is true that notwithstanding this rule we were required to 're-examine the facts as well as the law of the case' (*The Baltimore*, 8 Wall., 377), but we did not reverse

except in a clear case. Such was the well-established rule of decision."

It is suggested in the brief for the Government that the decree herein should be reformed by allowing for the Paquete Habana and her catch the sum of $2,569.34, to include damages, interest and costs. The basis of this statement is a valuation of $2,000 for the vessel based on Mr. Horr's suggestion that $1,500 would be her fair value in Key West (pp. 35, 37), at a time not stated, with the addition of $500, which counsel concedes should be added to Mr. Horr's estimate in order to make the allowance for the vessel reasonably adequate. It is manifest that this is only guess-work. The circumstance that counsel for the Government is conscious of the fact that *something* must be added to Mr. Horr's estimate is conclusive against the value of the witness's testimony, and would appear to justify the action of the commissioner in disregarding it. But if an addition is to be made to Mr. Horr's figures why should it stop at the sum of $500? He conceded frankly that he knew nothing of the value of smacks in Havana, or even in Key West (pp. 33, 37, 38); and so far as the testimony of the Government in relation to this particular vessel is concerned, it would be quite as admissible to suggest the addition of $3,500, as that of $500, to Mr. Horr's estimate in order to reach a figure which would constitute adequate compensation.

3. In the case of the *Lola* the testimony as to the value of the vessel was furnished by her owner, Severo Gonzales, of Guanabacoa (pp. 22, 23), and Juan Lluria

(pp. 23, 24), the shipbuilder and harbor master who testified in the case of the Paquete Habana. Francisco Gandon and Antonio Suarez testified as to the value of the fish. Pp. 25, 26.

Gonzales testified that the value of the vessel at the time of her capture was $5,000. He admits that he had obtained the vessel originally at a low price, but that after her purchase she had been careened at the Zaldo shipyard and extensive repairs made on her. The name of the person who effected the repairs is stated. The repairs were paid for in gold for all the daily labor expended and for materials, "and after everything had been paid for the vessel was appraised in $5,000." Pp. 22, 23.

Juan Lluria, whose qualifications have been previously stated, says: "I have inspected and valued the Spanish fishing smack Lola to be worth, on March 1, 1898, $5,000 Spanish gold, basing my appraisement of said vessel upon her special conditions, and my constant inspection of vessels of her class." He appends his certificate to that effect. *Lluria,* pp. 23, 24. The certificate further shows that the body, rigging, tackle, apparel and furniture of the vessel were all complete and in good condition. P. 24.

Fresh fish were testified to have been worth in Havana at the time of the capture $10 per quintal Spanish silver, equivalent to $5 gold for 100 pounds. Shipments of fresh fish were made to Havana throughout the war, from Batabano, a port on the south shore of the Island which does not appear to have been closed by our naval or military operations. Pp. 25, 26.

The only witnesses examined by the government in this case were Mr. Horr, the marshal, and Milton Curry. Mr. Horr, whose evidence was received subject to the claimant's objection that he was not a competent witness as to the value of the vessel (p. 30), expressed no opinion as to her actual value, but stated that he considered $5,000 to be excessive, because in his opinion such a vessel could have been built in Key West for considerably less money. P. 31. He stated, however, that he had had no experience in building or selling vessels of this character. Pp. 27, 32. He had heard that they could be built for $90 per ton, p. 34. It is an odd fact that the only proof in the case of the actual cost of building fishing vessels in Key West was given by another government witness, who had built two boats similar to the Antonio Suarez, a vessel of 49 tons, and they had cost about $10,000 apiece. *Lowe*, p. 42. This is at the rate of over $200 per ton.

The Commissioner rightly considered that Mr. Horr's opinion as to the value of the vessel was not that of a qualified witness. *Report*, p. 52. Moreover, it did not appear that Mr. Horr was speaking of the value in Cuba, or of the time of the capture.

Milton Curry, a merchant of Key West, who had never bought or sold sailing vessels (p. 39), and had had no experience with fishing smacks (p. 40) except that he had purchased the Lola and the Severita at the marshal's sale (p. 39), testified that his firm had bought the vessels for what he considered "fair prices to pay for them on specu-

lation." P. 40. He did not profess to have any knowledge of their value. He expected that under the change of government in Cuba the fishing business would be revived so as to permit American vessels to sell fish in Havana. He paid $800 for the Lola at the marshal's sale (p. 39), and subsequently sold her, after she had been wrecked at Tortugas and repaired, for the sum of $1,800. P. 40. It does not appear where, when, or to whom he sold her. There is nothing in the testimony to show what ultimately became of the vessel.

On this state of the proofs it is manifest that there is no merit in the contention that the Commissioner's report was contrary to the evidence, or was not supported by it. The observations that have been made with reference to the Report in the case of the Paquete Habana (*ante*, p. 23) apply with even greater force to his decision with reference to this vessel.

Counsel for the Government suggests in his brief that the decree in the case of the Lola should be modified by reducing the award for damages, interests and costs to the sum of $2,046.40. The basis of the computation which leads to these figures is the valuation of the vessel at the sum of $1,800, the price for which she was re-sold by Mr. Curry, who purchased her at the sale under condemnation proceedings. Pp. 39, 40.

It is submitted that there is no ground whatever for resting the valuation of this vessel on the price for which she was re-sold. Mr. Curry admits that between the time

he bought her and the time of her sale, she "was wrecked at Tortugas" (p. 40) and that the sale occurred after he had put "some repairs" on her. There is no statement of the extent of her injuries at Tortugas, nor as to whether she was fully repaired or not. He does not say that she was sold in Cuba at all, nor when, where nor to whom she was sold. Obviously the price for which Mr. Curry resold the boat under conditions not shown, is not a proper basis for the computation of the claimant's damages.

It is not understood why the Government offers less in the way of compensation for this vessel, than it offers for the Paquete Habana. According to its contention, the Paquete Habana was at least five years older than the Lola, and seven tons smaller, and there is no proof of any difference in condition that would justify an unfavorable discrimination against the Lola. Attention is called to this discrepancy merely for the purpose of emphasizing the danger of guessing at the damages, instead of measuring them by the proofs.

4. It may be doubted whether there is any proper foundation in the record for the First and Second Assignments of Error, under which it is argued that the Court erred in sustaining the report of the Commissioner as to the amount of the damages.

The only exceptions that were taken to the Commissioner's report, on that point, are the first and second, which were: *first,* "that the amount allowed as compensatory damages for the following vessels and each of them is excessive and not sustained by the evidence" [enumer-

ating among others the Paquete Habana and the Lola]; and, *second*, "that the value of each of said vessels, to wit, * * * Paquete Habana, Lola * * as ascertained by the Commissioner, is contrary to the evidence." *Paquete Habana Rec.*, p. 59; *Lola Rec.*, p. 54.

No suggestion was presented in the court below, either to the commissioner or to the court, as to the amount which the United States attorney thought the evidence would justify as an allowance for compensatory damages.

In *The Commander in Chief*, 1 Wall., 43, 50, the court held that exceptions to a commissioner's report, which were expressed in almost identical terms, were insufficient, and were not entitled to any consideration on appeal from the final decree. The exceptions there were that the commissioner "had no evidence to justify his report;" that the commissioner "reported more than the evidence warranted;" and "that the evidence showed the vessel to be of far less value than the report made it." P. 46. Mr. Justice Clifford, speaking for the court (p. 50), said:

"None of the exceptions to the report of the commissioner are entitled to any consideration" [except one which related to a different matter]. It was distinctly held that the exceptions above quoted were entirely insufficient.

In this Court, for the first time, counsel for the Government states the amounts which it is conceded should be recovered in these cases. The ground of the decision in *The Commander in Chief* appears to be that statements of that kind should have accompanied the exceptions

to the commissioner's report, and that attention should have been drawn to the testimony on which the Government claimed that the damages should be limited to those amounts. In that manner the contention of the Government would have been properly presented for consideration by the commissioner and for review by the court below, and this Court, in considering the matter on appeal, would have had the benefit of the decision of the court below on the real points in controversy.

5. The objections made by the Government to certain items of the amounts awarded for the vessels and for the catch remain to be considered.

It is somewhat difficult to analyze these objections, for the reason that they are not stated categorically or directed specifically to the reports in the individual cases. They appear, however, to come down finally to the single contention that the damages awarded are too large, and to involve only the question of the weight that should be given to the testimony produced by the different parties.

The Government appears to concede that the amounts which the vessels sold for in Key West on condemnation are not to be taken as evidence of their values, and that the absence of any demand for vessels of that class in Key West, and the inability of the boats to engage in fishing from that place, because there is no market there for the fish, deprive the estimates of witnesses as to the value of the property in Key West of the weight they might otherwise possess.

It is contended, however, that the amounts for which

some of the vessels were re-sold in Havana should be taken as controlling, or, at least, as evidence of the Cuban value, which may be regarded as in conflict with the testimony produced from Havana by the claimants. The argument from this premise appear to be that the decrees may be modified by reason of this assumed conflict in the proofs.

This, it is seen, raises merely a question as to the weight of the evidence. But, as the libelant's testimony does not show when, nor under what circumstances, nor to whom, the vessels were re-sold, nor even, in these two cases, that they were re-sold in Cuba, it would seem that the market price on re-sale could not fairly be received as evidence of the value of the boats at the time of the capture. Without such evidence there is nothing in the case which bears on the value of the vessels at that time except that on which the Commissioner rested his decision. In a sense, therefore, it may properly be said that the report of the Commissioner is in accordance with the undisputed testimony as to the value of the vessels and their catch at the time of their capture,—the only point he was called on to determine.

Some of the comments made by the counsel for the government on the claimants' testimony are scarcely justified by the facts. There is, *ex. gr.*, nothing whatever in the evidence to justify the intimation that the witness Lluria is not a credible and disinterested witness. His qualifications as a shipwright and shipbuilder are not challenged, nor is it denied that, as harbor-master, it was his duty to inspect and value vessels of this class, and report the results of his surveys and valuations to the

captain of the port, as he says that he did. He had been deputy harbor-master for many years under the Spanish *regime*, and at the time of his examination he occupied the office of chief harbor-master by the leave and authority of this Government. It is possible that he was a friend and neighbor of these claimants, but the record does not show it; and if the fact were conceded, it need not detract from the value of his testimony. No doubt Mr. Horr, the United States marshal, who testified for the Government, was a friend of the United States attorney; but the objections to his testimony do not rest on that ground. The United States attorney had a year and a half, after the return of the commission, to investigate the correctness of the facts set forth in Lluria's deposition, and during most of if not all the time the Government had a legal representative in Havana. The only inference that can fairly be drawn from these circumstances would appear to be that further evidence from Cuba, as to the value of the vessels, at the time of their capture, would not have been more favorable to the government than that which was produced by the claimants. The evidence of the owners is, of course, interested, but its verity appears to be established in each case by the corroborative evidence of a disinterested witness.

Speaking generally of the evidence of Mr. Horr and of the depositions of the government's witnesses examined in Key West, it may be said that those witnesses have not assumed to possess any knowledge of the value of fishing-vessel property in Havana, nor, with the exceptions of Mr.

Lowe and Mr. Cash, of the value of such property in Key West. The Commissioner, who was no doubt acquainted with all these witnesses, specifically found that none of the others was an expert on the value of smacks. *Paquete Habana Rec.*, p. 57. Neither Mr. Lowe nor Mr. Cash testified about the *Paquete Habana* or the *Lola*.

The Solicitor-General is in error in stating that the Key West witnesses had traded in vessels of this class for years. None of them except Cash and Lowe professed to have been interested or experienced in fishing vessel property, or to have been engaged in buying or selling boats of that class prior to these captures. *Horr, Paquete Habana Rec.*, p. 33; *Cates*, p. 42; *Curry*, p. 46; *Atchison*, p. 50; *Reedy*, p. 50; *W. Curry*, pp. 52, 53. They all concede that there was no demand or employment for such vessels in Key West, and that such a boat there was worth only what it could be sold for in Cuba. *Horr*, p. 38; *Cates*, p. 42; *Cash*, p. 44; *Curry*, p. 45; *Lowe*, p. 47; *Atchison*, pp. 49, 50; *Reedy*, p. 51; *W. Curry*, p. 53.

Mr. Horr, who intimated, with some reluctance, that there was not a great deal of difference in the cost of building small sailing vessels of the ordinary class and fishing smacks (*Paquete Habana Rec.*, p. 33), is shown to be entirely mistaken by the testimony of Mr. Lowe. Mr. Horr says that he had had offers to build vessels of the general class of these smacks at $90 a ton. P. 34. Mr. Lowe says that he had built, in Key West, two smacks of 49 tons measurement, each of which cost him about $10,000. P. 47. This is at the rate of more than $200 a ton. On Mr. Horr's figures these boats should have cost

only $4,410 apiece. This of itself shows the unreliability of Mr. Horr's valuations.

It is obvious to a layman that the building of a fishing boat, with large interior tanks, necessarily involves quite different principles of construction, bracing and strengthening; and that the buoyancy sacrificed in the construction of tanks connecting with the sea must be compensated for in other ways which can hardly fail to entail much additional expense.

All the witnesses agree, and it is not denied by the government, that the condition of the vessels was good. Some stress is laid, however, on the circumstance that some of the vessels were fifteen or more years old, and the suggestion is made that, by reason of their age, depreciation in the condition and value of the vessels should be presumed. This suggestion, however, is not supported by the proofs. Mr. Horr concedes that no reliable opinion can be formed of the value of an old boat without taking into account her actual condition, and without knowing how well she has been maintained, repaired and rebuilt, and that some old boats when rebuilt are practically as good as new. *Paquete Habana Rec.*, p. 39. Atchison admits that the value depends altogether on the vessel's condition. P. 48. The deputy marshal who had the boats in his custody says all were in generally good condition except one [not named] (p. 50), and the evidence of the other witnesses is to the same effect. The testimony of the claimants also establishes the fact that the vessels had been kept in repair, and were in good condi-

tion when captured. *Paquete Habana Rec.*, pp. 27, 29, 30; *Lola Rec.*, pp. 22, 23, 24.

The values ascertained by the Commissioner are, therefore, to be taken as the values of sound vessels in good condition.

Speaking generally, in reference to all the cases, it may be said that the prices for which some of the vessels were subsequently re-sold in Havana do not afford a fair criterion for estimating their value. The value which is to be made good to the claimants, is the value at the time and place of the capture. *Bates* v. *Clark*, 95 U. S., 204, 210. In a collision case the value would be taken as of the time of the loss, and, in case of a foreign vessel the damages ascertained and awarded would be the value in the home of the ship. The prices obtained for the vessels which were re-sold in Cuba are not shown to have any near relation to the values for which compensation is to be made. Neither the time nor the circumstances of the re-sales are stated. The speculators who bought the boats in Key West expected that the restrictions on the marketing of fish in Havana would be removed, after the war, and it is clear that they held the boats until it was definitely learned that no change was to be made in the laws on that subject. Mr. Curry says that he sold the two boats that he purchased [the Poder de Dios and the Antonio y Paco] "a few months after the purchase of them." P. 53. Beyond this there is nothing in the records showing when or to whom the vessels were sold, with the single exception of

the Espana. Mr. Cates states that he sold this vessel, at a time not stated, to her former owner. *Paquete Habana Rec.*, p. 42. He does not mention the name of his vendee, nor does it appear that he had any knowledge of the actual ownership of the vessel at the time of the capture. The time and circumstances of the sale would necessarily be of importance in determining whether the prices realized on re-sale afforded a fair criterion of their value when captured.

Little weight can be ascribed to the general testimony cited by the Government from the deposition of Deputy Marshal Atchison that all the vessels were sold back to the people in Havana. *Paquete Habana Rec.*, p. 50. He personally sold only one vessel in Havana, the Santiago Apostal. *Id.*, pp. 48, 50. It appears from the testimony of other Government witnesses that all the remaining vessels were sold by the persons who had bought them, and that Atchison was not connected with the purchase or re-sale of any of them. His statement, therefore, except as it applies to the Santiago Apostal, is manifestly hearsay, and may mean no more than that the vessels were resold on some form of speculation similar to that on which they were purchased in Key West, and that he assumed they were destined for Havana. At all events, Atchison makes no suggestion that any of the vessels were re-sold to any of their original owners. The only direct proof as to the re-sale of the vessels in Havana is that of Cates, referring to the Espana (*Paquete Habana Rec.*, pp. 40, 42), and Lowe, who re-sold the Engracia and the Cuatro de Setiembre (p. 47) to parties in Havana. Lowe refers to

all the vessels being sold "to a party all near the same time." *Paquete Habana Rec.*, p. 47. His evidence is somewhat vague. It does not state that the other vessels were sold in Havana. His testimony is susceptible of the inference that the vessels may have been sold singly or together either in Key West or Cuba, on a speculative basis, in the expectation that they would be re-sold to Cubans, who alone, apparently, could employ them with profit.

There appears to be no just ground, therefore, for the statement in the Government's brief that most of the vessels were *presumably* sold to their former owners. But, if it had been proved to be a fact that the vessels some months after the war had been re-purchased by their former owners, it would be an ironical application of the rule of compensation to take such prices as the measure of the claimants' damages. After enduring the hardships of war and seige, and having their fortunes depleted and their means of livelihood taken away by the seizure and condemnation of their vessels, it will hardly be presumed that the money which they may have been able to raise for the re-purchase of vessels at some later time afforded any just measure of the value of the vessels when captured. The sellers of the vessels had no use for them, and had bought them at prices which enabled them to make large profits on their investments on sales at figures which represented less than a quarter of the cost of building. The situation, then, was that the new owners were ready to sell cheap, and the former owners, presumably, would not

have been in a position to re-purchase except for beggarly prices. Bargains arrived at under such conditions, if any were in fact made, would naturally be at minimum prices, which may well have had little or no relation to the values of the vessels when captured.

If the vessels had in fact been re-sold to their owners, and it was intended to rely on those prices as the measure of the damages to be recovered, it may fairly be presumed that the claimants would have been interrogated on that subject, on their examination under the commission.

The conclusive answer to this suggestion, however, would appear to be that it was not raised in the court below. The contention was not presented to the Commissioner, nor was any exception taken to his report, on the ground that he did not adopt the rule of damages for which the Government now contends. *Paquete Habana Rec.*, pp. 59, 60. Nor is there any assignment of error to the principle on which the Commissioner and the Court below undertook to assess the damages. *Paquete Habana Rec.*, p. 66. The only error suggested is that the evidence did not sustain the conclusions of the Court below under the principle of decision that was adopted.

This discussion, however, appears to be wholly academic. There is no competent proof that any of the boats (with the possible exception of the Espana) were re-sold to their former owners; and as such a rule of damages would not afford indemnity for the loss of use or possibly of the chance of sale of the vessels on the

valuations then current, or restore the owners to the position they would have occupied if the boats had not been captured, it would not afford the compensation to which the claimants are entitled.

With reference to the two vessels here involved, *The Paquete Habana* and *The Lola*, the evidence does not show when, where or to whom they were sold. There is no room, therefore, for even a surmise that they may have been re-sold to their former owners.

It is also suggested that considerations of public policy should deter the Court from awarding to persons who, at the time of the capture, were enemies, the enhanced values which the vessels and catch may have had by reason of our military and naval operations; and that damages should be awarded on the basis of the assumed values of the property in times of peace.

With reference to this point it may be said that, if the claimants were technically enemies, the Court has already determined that their property was entitled to exemption from capture. In awarding compensation, therefore, the property is to be dealt with in the same manner as the property of friends. If its value was enhanced by reason of the war, that fact would not be material in measuring the damages except as showing the values current at the time when the right to compensation accrued. The right to compensation has been determined, and the damages are to be measured by the value of the property at the

time of the capture, with interest and costs. If that value was enhanced by the military or naval operations of our government, the claimants are, nevertheless, entitled to be paid at the enhanced amounts; for they represented the value which the property would have possessed, and at which, presumably, it could have been disposed of, but for the unlawful capture and condemnation.

These observations apply alike to the valuations of the vessels, and to the current price for the fish, at the time of the capture, as to which there is no dispute.

It may be observed, however, that the valuations given for the vessels are given as of March 1st, 1898, nearly two months before war was declared. *Lluria, Paquete Habana Rec.*, p. 30.

The rule quoted from *The Apollon*, 9 Wheat., 362, and relied on by the Government, can have no proper application, it is submitted, to the circumstances of these cases. The statement quoted from that case relates to vessels of general utility in commerce, and to the sales of cargoes in places where, presumptively, there would be a fair market for them. In these cases the circumstances are altogether peculiar, and different. It is conceded by all parties and by the witnesses that the vessels possessed nothing but a speculative value in Key West. The Island and its population are both very small and are distant 180 miles from the nearest place of commercial importance in Florida, and about 85 miles from Havana. The vessels by reason of their construc-

tion, were unsuited for any business save fishing, and the vessels could not be profitably employed in that business from Key West. Whether they could have been employed profitably along the northern coast of the Atlantic does not appear, but there is no suggestion in the proofs that persons engaged in the northern fisheries took the slightest interest in the boats. Under these circumstances the only reasonable basis for the award of damages, it is submitted, is the value which these vessels possessed, as Cuban craft, and such value can only be determined with reasonable certainty on the evidence which has been produced by the claimant, from Cuba.

Comment is made on the allowance of interest, and the rate at which it is allowed. No question on that subject, however, is properly before the court. There was no exception to the report of the commissioner as to the rate of interest, or as to the propriety of allowing it. Nor is there any assignment of error to the final decrees on this subject. Without any exception or assignment of error on the subject, no question relating to interest appears to be before the court. *The Commander in Chief,* 1 Wall., 43.

It may be observed, however, that interest has always been allowed in cases of this class, not only against private captors, but against the United States. *The Apollon,* 9 Wheat., 362, 376, 379, 380; *The Charming Betsy,* 2 Cranch, 64, 125; *The Anna Maria,* 2 Wheat., 327; *The Amiable Nancy,* 3 Wheat., 546, 562, 563; *The Nuestra Senora De Regla,* 108 U. S., 92, 104; *The Labuan, Appen-*

dix, post, p. ; *The Glen, Appendix, post*, p. ; *The Sybil, Appendix*, post, p. .

The allowance of interest, in these cases, was within the fair scope of the mandates, as a part of the "compensatory damages" to be recovered.

The rate allowed was the legal rate prevailing in the district in which the decrees were entered, and is in accordance with the practice sanctioned by this Court. Thus in *Texas & Pacific Ry. Co.* v. *Anderson*, 149 U. S., 237, 242, Mr. Chief Justice Fuller said:

"This Court awarded execution against the Company for the costs here, but it was for the Circuit Court to award execution for the amount of the judgment as it was directed to do, and as it did, and *interest was properly included at the rate which obtained under the law of Texas at the time the judgment was rendered.*" See also *Huey* v. *Macon Co.*, 35 Fed., 431; 1 *Sedgwick on Damages*, 8th Ed., §339.

It would seem that there can be no presumption that the rate of interest in Cuba, during or immediately following the war, when financial conditions were, notoriously, in an extremely unsettled condition, was less than the legal rate prevailing in the district in which the final decrees in these cases were entered.

The objection on the score of costs is quite unfounded. No costs have been awarded to the claimants; though the mandates directed that costs should be recovered. By an inadvertence the final decrees contain the statement that the claimants are to recover the "sum of $25 costs."

Paquete Habana Rec., p. 65; *Lola Rec.*, p. 60. It appears, however, that the $25 in question was the Commissioner's charge for his services on the reference (*Paquete Habana Rec.*, p. 59), which was specifically allowed *to him*, in the order confirming the report. *Id.*, p. 63. In fact, costs were not asked for by the claimants. There is no exception or assignment of error on this subject.

The claimants submit, in conclusion, that the cases are not of such a nature that awards should be given sparingly or with a grudging hand. If only a single case were before the Court, it would not, probably, be contended that the damages were unduly large. The complaint appears to be rather that the aggregate of the damages in twelve cases seems large. Whether the damages are large or not, must depend, finally, in each case, on the proofs, and on the legal principles to be applied in its determination. But it may be observed that the damages, such as they are, will go to a large number of people, none of whom had a large amount invested, or would receive a large sum as his share of the compensation; while it is perfectly manifest that the loss of use of the vessels, and the expenses and costs incident to the protracted litigation, into which the claimants, by no fault of their own, have been involved, must necessarily leave them, at the finish, without full compensation for their losses.

SECOND POINT.

THE DISTRICT JUDGE COMMITTED NO ERROR IN DECIDING THAT THE COMPENSATORY DAMAGES AWARDED TO THE CLAIMANTS UNDER THE MANDATE OF THIS COURT WERE PAYABLE BY THE UNITED STATES.

1. It appears to have been determined by the previous decision of the court that the compensatory damages awarded are to be paid by the United States.

It would seem that the only parties to these causes are the United States on the one hand, and the claimants of the vessels on the other.

Section 4618 of the Revised Statutes provides that "upon receiving the report of the Prize Master directed by the preceding section, the attorney of the United States for the District shall immediately file a libel against such prize property, and shall forthwith obtain a warrant from the court directing the Marshal to take it into his custody, and shall proceed diligently to obtain a condemnation and distribution thereof." Section 4630 provides that "the net proceeds of all property condemned as prize shall, when the prize was of superior or equal force to the vessel or vessels making the capture, be decreed to the captors; and when of inferior force, one-half shall be decreed to the United States and the other half to the captors."

In pursuance of these provisions libels were filed by

the United States, through its attorney for the Southern District of Florida, in both cases, and in the original decrees it was "ordered, adjudged and decreed that the said sloop Paquete [Lola] and cargo are condemned and forfeited *to the United States* as lawful prize of war." *Paquete Rec.*, pp. 1, 11, 14; *Lola Rec.*, pp. 1, 11.

Subsequently, and on June 15, 1898, Lieutenant W. V. Bronough, watch officer of the U. S. S. Castine, Lieutenant Henry Morrell, navigating officer of the same vessel, Commander B. F. Tilley of the U. S. S. Newport, and Lieutenant J. H. Bull, executive officer of that vessel, filed their depositions in the case of the Paquete Habana, claiming a part of the prize money. *Rec.*, pp. 16-19.

The record does not show any claim on behalf of the naval officers to participation in the proceeds of the Lola.

Any intervention of this character, however, is permissible only after final decree of condemnation, and is authorized only for the purpose of enabling the court to make distribution of the proceeds of the prize. R. S., §§ 4634, 4631. It seems doubtful, to say the least, that claims to distributive shares of that portion of the prize money which, under the statutes, falls to the captors, make the officers who present the claims parties to the cause.

The parties who were before this court on the previous appeal were, therefore, the claimants of the vessels on one side, and the United States on the other. As between those parties the court, speaking by Mr. Justice Gray, 175 U. S., 677, 714, said:

"Upon the facts proved in either case it is the duty of this court, sitting as the highest prize court of the United States, and administering the law of nations, to declare and adjudge that the capture was unlawful and without probable cause: and it is, therefore, in each case ordered that the decree of the District Court be reversed and the proceeds of the sale of the vessel, together with the proceeds of any sale of her cargo, be restored to the claimant with damages and costs."

On a subsequent day the court said (175 U. S., at p. 721):

"The court in each case, on motion of the Solicitor-General in behalf of the United States, and after argument of counsel thereon, and to secure the carrying out of the opinion and decree of this court according to their true meaning and intent, ordered that the decree be so modified as to direct that the damages to be allowed shall be compensatory only and not punitive."

This is the judgment of the court between the only parties who were before it. The plain effect of the decision appears to be that the court determined that the compensatory damages to be recovered by the claimants were to be paid by the United States.

If such is the effect of the previous decision any further discussion of this point is needless; for any matter that was determined on the previous appeal must be taken as final and conclusive throughout the subsequent stages of the litigation.

In the *Nuestra Senora De Regla,* 108 U. S., 92, at p. 100, Mr. Chief Justice Waite said:

"That the steamer was not lawful prize or the subject of capture was expressly decided on the former appeal.

It was also impliedly said that the capture was without probable cause, for, it was said, the owner was undoubtedly entitled to a fair indemnity for the losses sustained, the only difficulty being as to the amount. These questions, are, therefore, no longer open."

In support of that conclusion the court cited *Clark* v. *Keith,* 106 U. S., 464, and *Supervisors* v. *Kennicott,* 94 U. S., 499; to which may be added *The Lady Pike,* 96 U. S., 461.

In this connection it should be mentioned that no application was made by the United States to amend the judgment or mandate of the court so as to provide, if it had been competent to do so, that the judgment should be against the captors, as well as the United States, or against the captors alone. In the absence of such an amendment it would seem that the District Court was without power or authority to enter any decree, except a decree against the libelant of record. *In Re Potts,* 166 U. S., 263, 265, 267-268.

2. If it be considered that the mandate issued in pursuance of the previous decision of the court did not direct the District Court to enter its decree against the United States, the sole party libelant, and that it was competent for the court below, in executing the mandate, to enter a decree against the captors alone, or against the United States and the captors jointly, the court was, nevertheless, justified in entering the decrees against the United States as was done.

It is the settled practice in prize cases, where restitution

is ordered with damages, to assess and award the damages in the original cause against the libelants therein.

This was done without question in cases that arose prior to 1861. *The Charming Betsy,* 2 Cranch, 64; *The Amiable Nancy,* 3 Wheat., 354; *The Apollon,* 9 Wheat., 362. The rule was recognized by Congress in the Act concerning Letters of Marque, Prizes and Prize Goods, passed June 26, 1812. 2 *Stat. at Large,* pp. 759, 761.

Since the enactment of the Prize Acts of August 6, 1861 (12 Stat., p. 319), March 3, 1863 (12 Stat., p. 759), and June 23, 1864 (Rev. Stat., §§ 4613, 4652), it has been the practice to file all libels in prize causes in the name of the United States. No case has been found in which the United States appears as libelant and damages for unlawful capture have been awarded against the naval captors. On the contrary the practice, since 1861, has been to award the damages against the United States alone, or, in cases where the captors have intervened before condemnation and asked to be made co-libelants, against the United States and the naval captors jointly. *The Labuan,* Betts, J. (1862), Blatchford's Prize Cases, 165; petition of intervention by naval captors printed in Appendix, *post,* p. 65, and final decree entered by Benedict, J., in 1868, printed in Appendix, *post,* p. 67; *The Glen,* Betts, J. (1863), Blatchford's Prize Cases, 375; final decree printed in Appendix, *post,* p. 72; *The Sybil,* Betts, J. (1864), Blatchford's Prize Cases, 615; final decree entered by Blatchford, J., in 1868, printed in Appendix, *post,* p. 74; *The Nuestra Senora De Regla,* 108 U. S., 92; *The*

Teresita [Docket title, *The United States, Libt. and Apt.* v. *The Barque Teresita*], 5 Wall., 180, 182.

In *The Teresita, supra,* it appears from the record that the United States was sole libelant. The court below ordered restitution with costs and expenses to the claimants. The original record on file will probably show that the decree was in form as well as in substance against the United States. In the opinion of this court there was some discussion of the question of probable cause and of the further proofs which had been produced in behalf of the captors. The word "captors," as used in the opinion, evidently referred to the United States. In the *Neuestra Senora De Regla,* 108 U. S., 92, 101, the court said that the word "captors" in a libel by the United States, referred to the United States. When, therefore, the court in the *Teresita* said, "The decree of restitution must be affirmed and we shall direct the costs and expenses to be paid by the captors," it meant, apparently, that the costs and expenses were to be paid by the United States.

In *The Isabella Thompson,* 3 Wall., 155, restitution had been ordered by the court below. The captors appealed on the ground that the decree should have provided for the payment of costs and expenses to the claimants. The opinion is taken up entirely with a discussion of the question as to whether or not there was probable cause for the capture and it ends with the statement: "The District Court committed no error in refusing to give the claimants damages and costs as against the United States or the captors." There is, however, no intimation in the

opinion that the claim for expenses and costs as against the United States would have been untenable, on other grounds, if the absence of probable cause had been established.

§ 4640 R. S. appears to recognize the liability of the United States in prize cases where restitution is decreed. It provides:

"When the cause is finally disposed of, the Court shall make its order or orders on the Assistant Treasurer to pay the costs and charges allowed and unpaid; *and in case the final decree shall be for restitution,* or in case there shall be no money subject to the order of the Court in the cause, *any costs or charges allowed by the Court, and not paid by the claimants, shall be a charge upon and be paid out of the fund for defraying the expenses of suits in which the United States is a party or interested.*"

It is true that the general statutes contain no provisions for enforcing payment of judgments for damages against the United States for unlawful capture without probable cause. This matter was referred to in *The Nuestra Senora De Regla,* 108 U. S., 92, 103, where the Chief Justice said:

"It is true any judgment that may be rendered cannot be judicially enforced, but the questions to be settled are judicial in their character, and are incidents to the suit which the United States were required to bring to enforce their rights as captors. It is too late now to insist that the case is not one of prize, because in the libel it is expressly alleged that the vessel was captured as lawful prize, and condemnation was asked on that account. When, therefore, the United States, through the executive of the nation, waived their right to exemption from suit, and asked the prize court to complete the adjudication of

a cause which was rightfully begun in that jurisdiction, we think the Government is bound by the submission, and that it is the duty of the court to proceed to the final determination of all the questions legitimately involved."

Judgments for damages in such cases may be paid as provided in § 4640 R. S., or in the same manner as those which are recovered in the Court of Claims,—that is, by appropriations of money voted by the Congress. The only difference appears to be that decrees in prize cases have in many cases been paid by special, instead of by general acts. *Appendix, post,* pp. 71, 73, 77.

3. The United States, by entering the forum as an actor, and prosecuting to condemnation, for its own and its agents' joint use, the vessels whose unlawful capture it had ratified and confirmed, has submitted itself voluntarily to the jurisdiction of the Court, and is bound, under the universal practice in prize causes, to compensate the claimants for their loss.

It is to be observed that these are not actions of tort against the United States. They are in substance and effect mere claims for the restitution of property which the Government has unlawfully taken from private individuals. The principle involved is that property which one has wrongfully taken shall be returned, or if, by the procurement of the wrongdoer, the property cannot be returned in specie, its value should be returned.

If the Government had taken the vessels and applied them to its own use, instead of procuring them to be con-

demned and sold, without legal right, there could be no question that it would be bound to return the boats, or their value. *United States* v. *Russell,* 13 Wall., 623; *Clark* v. *United States,* 95 U. S., 539. It may be that this is the principle which underlies the decision in the *Nuestra Senora de Regla,* 108 U. S., 92. Nor could there be any question of the right of the Prize Court to order the United States to restore the vessels, if they still remained in specie and were subject to its control.

It would appear to be an extreme refinement of principle which would deprive the Court of jurisdiction to determine that the United States should refund the value of the property unlawfully taken, simply because it is now beyond the power of the Government, solely in consequence of its own action, to return the vessels themselves.

No claims are made against the Government, beyond the value of the property against which it proceeded and which it caused to be condemned. They are, in substance, merely claims for restitution. Properly speaking, they are not affirmative demands against the Government for damages arising *ex delicto.* For this reason, the authorities cited by the Solicitor General, in which the immunity of the United States from tort actions is asserted, appear to have no real application to these controversies.

The Court, in previous decisions, has recognized the liability of the Government to the extent of the value of the property involved, where it has voluntarily submitted

itself to the jurisdiction of the Court as a plaintiff against such property.

In *The Siren,* 7 Wall., 152, 154, Mr. Justice Field, speaking for the Court, said:

"When the United States institute a suit, they waive their exemption so far as to allow a presentation by the defendant of set-offs, legal and equitable, to the extent of the demand made or property claimed, and *when they proceed in rem,* they open to consideration all claims and equities in regard to the property libelled. They then stand in such proceedings, with reference to the rights of defendants or claimants, precisely as private suitors, except that they are exempt from costs and from affirmative relief against them, *beyond the demand or property in controversy.* * * * (p. 159). Such decree of sale could only be made upon application of the government, and by its appearance in court, as we have already said, it waives its exemption and submits to the application of the same principles by which justice is administered between private citizens."

The Court here clearly recognizes the liability of the United States to the extent of "the demand or property in controversy."

In *Carr* v. *The United States,* 98 U. S., 436, 438, Mr. Justice Matthews said:

"The cases like that of the Siren and the Davis, already referred to, and many others therein cited, in which the proceeds of government property, incidentally brought into the admiralty, have been subjected to the liens of claimants against the same, stand upon the principle that when the government itself seeks its rights at the hands of the court, equity requires that the rights of

other parties interested in the subject matter should be protected."

Mr. Justice Miller in *Case* v. *Terell,* 11 Wall., 199, 201, and Mr. Justice Gray in *United States* v. *Lee,* 106 U. S., 196, 248, asserted the principle upon which *The Siren* and *The Davis* were based to be that "the government came into court of its own volition to assert its claim to the property, and could only do so on condition of recognizing the superior rights of others."

In *Clark* v. *Barnard,* 108 U. S., 436, 448, Mr. Justice Matthews said:

"In the present case, the State of Rhode Island appeared in the cause and presented and prosecuted a claim to the fund in controversy, and thereby made itself a party to the litigation to the full extent required for its complete determination. It became an actor as well as defendant, as by its intervention the proceeding became one in the nature of an interpleader, in which it became necessary to adjudicate the adverse rights of the State and the appellees to the fund, to which both claimed title."

In *Cunningham* v. *R. R. Co.,* 109 U. S., 446, 452, Mr. Justice Miller said:

"And the State, if it choose to come in as plaintiff, *as in prize cases,* or to intervene in other cases when she may have a lien or other claim on the property, will be permitted to do so, but subject to the rule that her rights will receive the same consideration as any other party interested in the matter, *and be subjected in like manner to the judgment of the court.*"

The case of the *Nuestra Senora de Regla,* 17 Wall., 29; 108 U. S., 92, was decided on peculiar facts, but, in the

result, it acknowledged and adjudged the liability of the United States to make compensation to the claimants on a finding that the capture had been made without probable cause.

The Nuestra Senora de Regla was a side-wheel ferry-boat of light draft, which had been built in New York for Spanish owners, and was intended to be operated on the Regla Ferry in Havana Harbor. On her way down the coast in November, 1861, she came to the blockading fleet, which was then operating off Port Royal, S. C., and received the permission of the Admiral in command to pass the blockade and enter the port. On her arrival there, Gen. Sherman who was in command of the United States forces, perceived that "she is just the thing we want, and admirably adapted for these waters and our purpose" (108 U. S., at p. 93), and thereupon, on the refusal of the master to sell the vessel to the Quartermaster of the United States at that port, he ordered that she be seized. No judicial proceedings were instituted for her condemnation at the time, though she was detained, and in December, 1861, a charter party was entered into between the Chief Quartermaster and the master of the vessel, without prejudice to the claim of the Government that she was subject to condemnation, under which the boat was to be employed at the rate of $200 a day until the contract should be cancelled. In January, 1862, she was, in form, delivered to the Flag Officer of the Navy in command at that station, by whom she was kept in service until about March 1, 1862, when she was sent to New York, and libeled by the

United States "in behalf of themselves and of the Naval captors in interest" (p. 94). In August, 1862, Judge Betts ordered that the vessel be delivered by the Marshal to the Navy Department, at a valuation to be determined by an appraisement, and this was done. In June, 1863, a decree of restoration was entered, but the vessel never was restored. In October, 1863, it was ordered "that further proceedings in the litigation be stayed, on the consent of counsel, to the end that all questions of damages reserved in the decision of the Court in the term of June last, may be considered and adjusted by the Government of the United States on the application and with the concurrence of the Government of Spain." No adjustment was arrived at between the two Governments, and on May 27, 1870, Mr. J. C. Bancroft Davis, Acting Secretary of State, brought the correspondence to an end by advising the Spanish Minister in Washington, "that it will be more satisfactory to the Government that the parties interested should apply to the Court, which *still retains its jurisdiction of this case*, to obtain such further relief as justice may demand, and in the mode which that tribunal shall deem most proper and convenient." 108 U. S., 96.

This was tantamount to a statement that the owners of the vessel should proceed with the prize action and establish whatever rights they might have in the ordinary way.

The district court thereupon proceeded to an assessment of the damages, and on appeal, the decree entered on the Commissioner's report was reversed by this Court,

on the ground that the decision below proceeded on improper grounds, and included an item of counsel fees which was not recoverable. 17 Wall., 29.

On the second appeal, Mr. Chief Justice Waite, in delivering the opinion of the Court, dealt with the question of the liability of the United States to pay the damages (pp. 101, 102), as follows:

"The first of the remaining questions to be considered is whether a decree can be entered against the United States for damages. As the capture was made by the army, or by the army and navy operating together, it inured exclusively to the benefit of the United States. There is no distribution of prize money in such a case. *Porter* v. *United States*, 106 U. S., 607; *The Siren*, 13 Wall., 389. The United States were, therefore, in legal effect the captors, and they came voluntarily into court to secure for themselves the benefit of what had been done. They deliberately adopted the acts of the military and naval officers as their own, and came, as captors, to condemn their prize. Offers to purchase the vessel were made and declined before she was seized, and soon after the seizure she was chartered and put into actual use without any attempt at securing an adjudication."

(P. 102: "Although the libel was filed on the 9th of June, 1862, and the claim was promptly put in, the adjudication was not had until June of the following year, when all further proceedings were stayed with the consent of both parties to await an adjustment of damages by the two governments. Nothing further was done until nearly seven years afterwards, when the secretary of State informed the Spanish government of the wish of the United States that the parties interested should apply to the court, which still retained jurisdiction, for such relief as justice demanded, and in the mode that tribunal should deem most proper and convenient. Thereupon, on motion of

the claimant, and with the consent of the United States district attorney, the reference was ordered to ascertain the damages. Under these circumstances we cannot but think the United States have voluntarily submitted themselves to the court at the instance of the Spanish government, and with the consent of the claimant, for the purpose of having the questions of damages growing out of the capture judicially settled according to the rules applicable to private persons in like causes.

"It is objected, however, that the executive department of the government had no power, in the absence of express legislative authority, to make such a submission. It was the duty of the United States, under the law of nations, to bring all captured vessels into a prize court for adjudication. If that had not been done in this instance, the Spanish government would have had just cause of complaint, and could have demanded reparation for the wrongs that had been done one of its subjects. The executive department had the right to bring the suit. In that suit it had been determined that the capture was unlawful. Necessarily, therefore, the question of damages to the owner of the captured vessel arose. Since, without the consent of the United States, no judgment for damages could be rendered against them in the pending suit *that could be enforced by execution*, the Spanish government had the right to assume the prosecution of the claim, and it did. Necessarily the negotiations on the part of the United States under this claim were conducted by the executive. After long delay no agreement was reached, and as a last resort for ending the controversy, it was determined to refer the whole matter to the court for judicial inquiry and determination. We can see no reason why this might not be done in such a case.

"It is true any judgment that may be rendered cannot be judicially enforced, but the questions to be settled are judicial in their character, and are incidents to the suit which the United States were required to bring to enforce their rights as captors. It is too late now to insist that the case is not one of prize, because in the libel it is expressly

alleged that the vessel was captured as lawful prize, and condemnation was asked on that account. When, therefore, the United States, through the executive of the nation, waived their right from exemption from suit, and asked the prize court to complete the adjudication of a cause which was rightfully begun in that jurisdiction, we think the government is bound by the submission, and that it is the duty of the court to proceed to the final determination of all the questions legitimately involved."

It is submitted with respect, that the Court, in that case, attached an undue importance to Mr. Davis's note. It is true that it had been preceded by certain negotiations looking to an amicable settlement of the controversy, but yet, in substance and effect, the note said nothing more than probably would have been said by the Secretary of State to these claimants, if they had presented a claim for indemnification to the executive branch of the Government, viz.: that the right to indemnity should be established in the ordinary manner in the court in which the controversy was pending.

Whatever doubts the Court may have had as to the propriety of determining the cause, as it did, may well have resulted from the fact that it was not, strictly speaking, a prize case. It was nothing more, in effect, than an impressment into the military and naval service of the Government of property found in the sphere of military operations. It would seem that, as the vessel never was returned to her owners, an action for her value might have been prosecuted in the Court of Claims. *United States* v. *Russell*, 13 Wall., 623; *Clark* v. *United States*, 95 U. S.,

539. The word "Prize," as was said by Lord Stowell in *The Genoa*, 2 Dodson, 468, "evidently means maritime capture effected by maritime forces *only*—ships and cargoes taken by ships." That definition was approved by this Court in the *Siren*, 13 Wall., 389, 395. But if the case could properly have been regarded as a maritime capture, still it would seem not to have been a case of lawful prize because of the provisions of the Act of July 2, 1864 (13 *Stat.*, 377), which declared that "no property seized or taken upon any of the inland waters of the United States, by the naval forces thereof, shall be regarded as maritime prize." The Court held that it was too late to raise the point that the case was not one of prize, after a libel had been filed by the United States, which expressly alleged "that the capture was lawful prize," and demanded condemnation on that account. P. 103.

It is thus seen that the case presented a peculiar state of facts, and any doubts expressed in the opinion as to the liability of the Government must be considered with reference to those facts. In the end, it was considered that the Government had, by the conduct of its agents, submitted itself to the jurisdiction of the Court, so that even on the facts as they stood, it should be adjudged liable to make compensation to the plaintiffs. The same result should follow in these causes, for the same reasons.

The English Courts also recognize the principle that a sovereign, otherwise exempt from suit, may subject itself to judgment in a cross-suit, if it invokes the juris-

diction of the court as a plaintiff. In the *Newbattle,* 10 Prob. Div., 33, the King of the Belgians, as owner of a commercial vessel named the *Louise Marie* instituted a collision action against the British steamer *Newbattle,* which was compelled to give bail. A cross-action was instituted, and an application was made to compel the King of the Belgians to give security thereunder. Butt, J., granted the application, and his action was confirmed by the court of appeal, consisting of Brett, M. R., Cotton, L. J. and Lindley, L. J. Brett, M. R., at p. 35, said:

"It has always, however, been held that if a sovereign prince invokes the jurisdiction of the Court as a plaintiff, the Court can make all proper orders against him. The Court has never hesitated to exercise its powers against a foreign government to this extent. It is another question as to what may be the result of an application for execution by seizure of the plaintiffs' ship, if the judgment should be against the plaintiffs."

Cotton, L. J., at p. 35, said:

"But when a government comes in as a suitor, it submits to the jurisdiction of the Court and to all orders which may properly be made. Regard must of course be had to the fact that in this case the King of the Belgians is a sovereign prince, but the order is nevertheless a proper one. It is a reasonable principle that a plaintiff whose ship cannot be seized, and against whom a cross action has been brought, shall put the defendant in the same position as if he (the defendant) were a plaintiff in an original action against a defendant whose ship could be arrested as security."

In *King of Spain* v. *Hallet,* 2 Bligh, n. s., 31, the de-

fendant filed a cross-bill against the King of Spain. The Lord Chancellor, at page 57, said:

"If he [a foreign sovereign] appears as plaintiff, you can do complete justice, you can impose any terms you think proper, you have them in your power, you may file a cross-bill, and then you have him completely under your control and jurisdiction."

4. No error has been assigned to the decision of the court below in awarding the damages against the United States alone, instead of against it and the naval captors jointly.

No application was made to the court below, so far as the claimants are aware, for a decree against the libelant and the naval captors jointly. It would seem that no such application could, properly, have been made, for the reason that the naval captors did not intervene as co-libelants, and join in the prayer for condemnation. Indeed the Revised Statutes do not appear to contemplate or to permit an intervention of that nature under the practice as it stood at the time of these captures. *R. S.*, §§ 4630, 4631, 4634.

The only contention presented by the United States Attorney, on this subject, was that the decree should be against the naval captors alone. There can be no question, it would seem, that the Court below rightly decided, on the record as it stood, against that contention. The naval captors had, it is true, taken and brought in the vessel; but their action had been ratified and confirmed by the United States, and the libel for condemnation was

in its name. The naval captors took no further part in the proceedings until after the condemnation of the vessel. Joint decrees against the libelant and the captors would have been of advantage to these claimants, but as the record stood there appeared to be no ground for asking the Court to enter them in that form.

The point appears, moreover, to be of academic interest only. It has been the general practice of the Government to indemnify its naval officers in all cases where judgments have been rendered against them for unlawful captures. Numerous instances of such action are cited in libelant's brief. The claimants in these cases may be unable to obtain satisfaction of their decrees, except through the medium of an appropriation. In the end, therefore, if the claimants must go to Congress to obtain whatever money is awarded to them, it is difficult to see how it will make any difference to the Government whether the decree is against the servants of the Government alone, or against those servants and the United States jointly, or against the United States alone.

LAST POINT.

THE DECREES IN THE CASES OF THE PAQUETE HABANA AND THE LOLA SHOULD BE AFFIRMED WITH COSTS.

March 17, 1903.

Respectfully submitted,

CONVERS & KIRLIN,

Proctors for the Appellees,

5 Beekman Street,

New York.

J. PARKER KIRLIN,

Advocate.

APPENDIX.

1.

DISTRICT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

The United States vs. The Steamer "Labuan," her tackle, &c.,	In Prize.

To the Honorable SAMUEL R. BETTS, Judge of the District Court of the United States for the Southern District of New York:

The Petition of Intervention of S. Swartwout, Commander, and of the officers and men of the United States Vessel of War, the "Portsmouth," respectfully represents:

That they were the Naval Captors of the Vessel and Cargo, which have been sent in for adjudication herein by this Honorable Court, and as such have an equal interest with the Libelants in the said adjudication.

They aver that the facts set forth and contained in the Libel of information herein are all true and correct, and they join in the prayer thereof for the Decree of this Honorable Court of the condemnation of said captured property as lawful prize of war.

And these Intervenors do further pray, that after said Decree of condemnation shall have been duly rendered herein,

and the said captured property shall have been sold pursuant thereto, unless the same shall have been previously sold upon interlocutory order, this Honorable Court will proceed to render a final decree of division and distribution of the proceeds of the sale of said captured property, deducting therefrom the costs of these proceedings, pursuant to the Report of the Prize Commissioners, and in accordance with the provisions of the statutes of the United States.

F. H. Upton,
Proctor & Advocate
for the Naval Captors.

[Endorsed:]—17-126. Dist. Court of the United States. The United States *vs.* The Steamer "Labuan" & her Cargo. In Prize. Intervention of Naval Captors. F. H. Upton, Proctor. Filed 5 May, 1862.

A true copy.
Thos. Alexander,
[Seal.] Clerk.

2.

At a Stated Term of the District Court of the United States of America for the Southern District of New York, held at the United States Court Rooms, in the City of New York, on Wednesday, the twenty-fifth day of March, in the year of our Lord one thousand eight hundred and sixty-eight.

Present—The Honorable CHARLES L. BENEDICT,
District Judge.

The United States of America vs. The Steamer "Labuan," her tackle, &c., and cargo.	In Prize. 17 126.

The Report of George F. Betts, Esq., Special Commissioner herein, to whom it was referred to ascertain and report the amount of damages sustained by the Claimants by reason of the seizure and capture of the above-named vessel and cargo in the above-entitled cause, and by which Report it appearing that the owners of the said Steamer "Labuan," viz., Messrs. William Bailey and William Leatham, have sustained by reason of said seizure and capture the following damages, viz.:

1.	The Labuan taken 1st Feby., 1862, and released by the Court May 21, 1862, being one hundred and eleven days at $1,000 per day	$111,000.00
2.	Detention during survey of damages, docking, refitting, &c., May 22nd to June 2d, 1862, 12 days at $1,000 per day	12,000.00
3.	Stores taken out of the vessel broken and destroyed, &c	7,752.68
4.	Captain Harnshaw for property lost	171.82
5.	Property lost by Charles Hargett (Mate)	96.80
6.	Interest on above from June 2, 1862, to March 17, 1868, at 6%	45,599.30
7.	Counsel fee	5,000.00
	Total	$181,820.60

And it further appearing by said report that Messrs. De Jersey & Co., the Owners of part of the cargo of said Steamer Labuan, have sustained by reason of said seizure and capture the following damages, viz.:

Loss of coal consumed on voyage from Matamoras to New York, £540.0s.0d. or	$2,613.60
Loss on Cotton damaged on voyage while under seizure	297.82
Law Expenses	702.50
	$3,613.92
Interest from May 21, 1862, to March 17, 1868, at 6%	1,172.38
Total	$4,786.30

And it further appearing that F. Armendaig, the owner of the residue of the said cargo, has sustained by reason of such capture and seizure the following damages, viz.:

Charges of Messrs. M. Echeverria & Co. and expenses attending the receiving, &c., of 170 Bales of Cotton	$1,335.72
Interest on the value of the Cotton while detained	400.45
Legal Expenses paid Wright & Merrihew	306.00
Legal documents from Matamoras	25.00
	$2,067.17
Interest from June 6, 1862, to March 17, 1868, at 6%	716.56
Total	$2,783.73

All of which items are on the basis of $4.84 to the pound Sterling.

And it further appearing that no exceptions have been filed to said report,

Now, on motion of Beebe, Dean & Donohue, for the claimants Bailey & Leatham, owners of said vessel, and for F. Armendaig, claimant of part cargo, the District Attorney appearing and not opposing,

It is Ordered and Decreed, that the said Report of said Special Commissioner be and the same is hereby in all things confirmed, and that final Judgment be and the same is hereby rendered in the above cause in favor of the claimants of said vessel and cargo against the Libelants and Captors for the respective sums so reported by said Referee on the ground that said captured property was not lawful prize of war.

CHAS. L. BENEDICT.

[Endorsed:]—17-126-130.—In Prize.—U. S. District Court for the Southern District of New York.—The United States of America *vs.* The Steamer Labuan, &c., and cargo. —Final Judgment for Claimants Beebe, Dean & Donohue, Proctors for Clts.—Bailey & Leatham & F. Armendaig.—Filed March 25th, 1868.

A true copy.

THOS. ALEXANDER,

[SEAL.] Clerk.

3.

CHAP. CCXX.—An Act to carry into effect the decree of the District Court of the United States for the Southern District of New York in the case of the British steamer Labuan.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there be paid, out of any money in the treasury not otherwise appropriated, to William Bailey, William Leetham and John Leetham, of England, or their legal representatives, owners of the British steamer Labuan, one hundred and thirty-one thousand two hundred and twenty-one dollars and thirty cents, with interest from June second, eighteen hundred and sixty-two, to the time of payment, and five thousand dollars without interest; also, to Messrs. De Jersey and Company, of England, or their legal representatives, part owners of the cargo of the same steamer, three thousand six hundred and thirteen dollars and ninety-two cents, with interest from May twenty-first, eighteen hundred and sixty-two, to the time of payment; and to Francisco Amendiaz, of Matamoras, Mexico, or his legal representatives, part owner of the cargo of the same steamer, two thousand and sixty-seven dollars and seventeen cents, with interest from June sixth, eighteen hundred and sixty-two, to the time of payment; such sums being due under a decree of the District Court of the United States for the Southern District of New York, pronounced March twenty-fifth, eighteen hundred and sixty-eight, on account of the illegal capture of the British steamer *Labuan* and her cargo by a cruiser of the United States.

Approved July 7, 1870.

16 Stat., 649.

4.

At a Stated Term of the District Court of the United States of America, for the Southern District of New York, held at the United States Court Rooms, in the City of New York, on Saturday, the Twenty-fourth day of October, in the year of our Lord one thousand eight hundred and sixty-three.

Present—The Honorable SAMUEL R. BETTS, District Judge.

The United States, &c., & Captors vs. The Schooner "Glen," her tackle, &c., and cargo.	In Prize. 18 22.

A decree of restitution of the above-named vessel and cargo having been heretofore made and entered in this cause in favor of the Claimant thereof and awarding said Claimant costs, damages and expenses, by reason of the illegal seizure of said vessel and cargo as prize: And it having been subsequently referred by an order of the Court herein to Henry N. Elliott, Esq., to ascertain and report the amount of such damages and expenses: And the said Referee having in pursuance of said order reported to the Court that the damages and expenses sustained by the said Claimant by reason of said illegal seizure of the vessel and cargo amounts to the sum of Seventeen thousand one hundred and fifty dollars and sixty-six cents ($17,150.66);

Now, on motion of Beebe, Dean & Donohue, Proctors for the Claimant of said vessel and cargo,

It is Ordered, that Final Judgment be and the same is hereby rendered in the above cause in favor of said Claimant against the Libelants and captors for the sum of Seventeen thousand one hundred and fifty dollars and sixty-six cents, being the amount of the damages and expenses sustained by the Claimant as aforesaid.

SAM'L R. BETTS.

[Endorsed:]—In Prize.—Vol. 18, No. 22.—United States District Court, for the Southern District of New York.—The United States & Captors *vs.* The Schooner "Glen," her tackle, &c., and cargo.—Final Judgment.—Beebe, Dean & Donohue, Proctors for Clmt.—Filed the Twenty-fourth day of October, 1863.

A true copy.

THOS. ALEXANDER,

[SEAL.] Clerk.

5.

CHAP. X.—An Act to indemnify the owners of the British schooner Glen.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there be paid to the owners of the British schooner *Glen*, out of any money in the treasury not otherwise appropriated, the sum of Seventeen thousand one hundred and fifty dollars and sixty-six cents, the same being the amount awarded as an indemnification to the parties interested, by the District Court of the

United States of America for the Southern District of New York, for costs, damages and expenses, by reason of the illegal seizure of the said vessel and cargo as prize.

Approved February 13, 1864.
13 Stat., 575.

6.

At a Stated Term of the District Court of the United States of America, for the Southern District of New York, held at the United States Court Rooms, in the City of New York, on Monday, the Second day of March, in the year of our Lord one thousand eight hundred and sixty-eight.

Present—The Honorable SAMUEL BLATCHFORD, District Judge.

The United States, &c., vs. The Schooner "Sybil," her tackle, &c., and cargo.	In Prize, 18,506.

A decree having been heretofore on the 21st day of December, 1864, made and entered in this cause, decreeing that the above-named vessel, her tackle, &c., and cargo be restored to the claimants thereof with costs to the said claimants on the ground that said captured property was not lawful prize of war. And it having been subsequently referred by an order of the Court

made herein on the 13th day of April, 1867, to John A. Osborn, Esq., as Special Commissioner to ascertain and report the amount of damages to which the claimants of the said vessel and cargo are entitled by reason of the capture and seizure herein, each party to have the right to put in proof on any point they might be advised, all other questions being reserved until the coming in of the Report of said Special Commissioner, and the said Referee having by his Report dated the 1st day of February, 1868, and filed in this Court on said last-named day and made in pursuance of said order, reported to the Court that there is due to Godfried Knoop, the claimant of two hundred and eighty-four bales of cotton (the same being a part of the cargo of said vessel) the sum of Forty-one thousand four hundred and twenty-nine dollars and fifty-nine cents, together with Fifteen hundred dollars counsel fees which he, said Knoop, paid to his counsel employed in the suit, making in all as damages and expenses the sum of Forty-two thousand nine hundred and twenty-nine dollars and fifty-nine cents, and that there is due to Thomas J. Hand, claimant of four bales of cotton (the same being a part of the cargo of the said vessel) the sum of Five hundred and seventy-six dollars as damages for depreciation in said cotton; and that the owner of the said vessel sustained a loss by the detention of the said vessel while under seizure to the sum of Six thousand and six hundred dollars, the vessel having been detained thirty-three days at two hundred dollars per day, and that the said owner was put to the expense of paying One hundred dollars for papers and documents for the suit in Court, together with the sum of One thousand dollars to counsel employed by said owner, making in all as damages to the owner of the vessel and expenses of defending the suit the sum of Seven thousand seven hundred dollars, with interest on the same from January 1st, 1865, to February 1st, 1868, amounting to Fourteen hundred and twenty-four dollars and fifty cents, making in all as damages to the owner of the vessel

or to Oliver K. King, the person for whom the vessel ws held in trust, including the interest as aforesaid, the sum of Nine thousand one hundred and twenty-four dollars and fifty cents. And no exceptions on the part of the United States having been filed to said Commissioner's Report,

7.

Now, on motion of Bowdoin, Larocques & Barlow, proctors for Godfried Knoop, and of Beebe, Dean & Donohue, proctors for Thomas J. Hand and for William Stewart (the owner of said vessel), it is ordered, adjudged and decreed that the said Report be and the same is hereby confirmed and that Final Judgment be and the same is hereby rendered in the above cause in favor of the claimants, against the libelants and captors for the respective sums so reported by said Referee, on the ground that said captured property was not lawful prize of war, the amount awarded to the owner of the vessel to be paid to Oliver K. King.

SAM'L BLATCHFORD.

[Endorsed:]—In Prize.—Vol. 18, No. 506.—United States District Court, for the Southern District of New York.—The United States *vs.* The Schooner Sybil, &c., & cargo.—Final Judgt. agst. Libts. & captors & in favor of Clts. for $52,630.09/100.—Bowdoin, Larocques & Barlow, Proctors for Godfried Knoop, Clt., 284 Bales Cotton. Beebe, Dean & Donohue, Pr. for T. J. Hand, Clt., 4 Bales Cotton, & Wm. Stewart, Clt. of vessel.—Filed the Second day of March, 1868.

A true copy.

THOS. ALEXANDER,

[SEAL.] Clerk.

CHAP. CCXXI.—An Act to carry into effect the decree of the District Court of the United States for the Southern District of New York in the case of the English schooner *Sibyl* and her cargo.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Treasury be, and he is hereby authorized and directed, out of any money in the treasury not otherwise appropriated, to make the proper payments to carry into effect the decree of the District Court of the United States for the Southern District of New York, bearing date the second day of March, eighteen hundred and sixty-eight, in the case of the English schooner *Sibyl* and her cargo, illegally seized by a cruiser of the United States; such payments to be made as follows, viz.: To the several persons named in such decree, or their legal representatives, the sums therein awarded to them respectively, with interest from the date of the decree.

Approved July 8, 1870.

16 Stat., 650.